TAI KWONG GOLDSMITHS & JEWELLERS (IN RECEIVERSHIP)

v.

YAP KOOI HEE & 16 ORS.

SUPREME COURT, KUALA LUMPUR
TAN SRI DATO' HAJI MOHD AZMI BIN DATO' HAJI KAMARUDIN SCJ.
DATO' MOHAMED DZAIDDIN BIN HJ ABDULLAH SCJ.
DATO' V.C. GEORGE J.
[CIVIL APPEAL NO. 02-205-93]
21 OCTOBER 1994

PARTNERSHIP LAW: Distribution of partnership assets by receivers - Unsecured liabilities - Priorities on payment out - Whether on pari passu basis - Whether on first come first paid basis - Maxim of Equality is Equity - Whether to be applied - Partnership Act 1961 ss. 46 & 47.

RECEIVERS AND MANAGERS: Proceedings against Court appointed receivers without leave - Prohibition - General principle thereof - Whether of wide application - Whether to apply only to cases where conduct of receiver put to issue.

RECEIVERS AND MANAGERS: Execution proceedings against Court appointed receiver without leave - Whether amounted to contempt - Whether to be restrained - Whether leave of Court a condition precedent - Execution orders thereof - Whether bad and of no effect - Order 46 r.(2)(1) Rules of the High Court 1980.

This was an appeal against the decision of the High Court in ruling *inter alia* that except where misconduct was alleged, leave was not necessary in order to take out execution proceedings against a receiver appointed by the Court. The facts were that the appellant, a partnership firm, was dissolved by a Court order and consequent to that a receiver was appointed by the Court to distribute the firm's assets under s.46 of the Partnership Act. In consequence about RM1 million had got into the hands of the receiver.

Sometime after the appointment, three unsecured creditors who had judgments against the firm, without leave of the Court, took out garnishee proceedings against the receiver and pursuant to that, obtained garnishee orders against the said monies. In the summons for directions applied for by the receiver later in respect of priority to be given in respect of the payment out of the said monies, the three creditors, as intervenors thereto, argued that by reason of the garnishee orders aforesaid, they had gained priority over all the unsecured creditors and hence, were entitled to be paid forthwith.

The learned Judge, while ruling that the garnishors did not require leave to proceed with the garnishee proceedings in question, went on to distinguish *Zainal Abidin Putih v. Che Wan Development Sdn. Bhd.* [1992] 3 CLJ 1539 [1992] 2 MLJ 233 and held that the principle laid down in that case that proceedings may not be instituted against a receiver without leave did not apply. According to the learned Judge the view he adopted was supported by O. 46 r.2(1) RHC 1980, as that Order, in setting out instances where writs of execution may not issue without leave, had "conspicuously and specifically omitted to include

garnishee proceedings". As for the monies in the hands of the receiver, it was ruled that distribution *pari passu* in respect of unsecured liabilities did not apply to distribution of partnership assets under to s.46 of the Partnership Act. Hence, the receiver, in the view of the learned Judge, was bound to pay out on the first come first paid basis.

Before the Supreme Court the primary issue that arose was whether the two rulings made by the learned Judge aforesaid were proper, and in any case, whether the same reflected the true position of the law.

Held:

[1] It is trite that a Court appointed receiver is an officer of the Court having duties to perform by order of the Court and is entitled to protection by the Court against interference with his duties. Such being the case leave of the Court should have been obtained to proceed against him and this is irrespective of whether or not his conduct is in issue.

[2] This Court cannot agree with the learned Judge's suggestion that *Zainal Abidin Putih v. Che Wan Development Sdn. Bhd.* does not apply and would reiterate that there is a general principle of wide application that interference with persons having duties to perform in or at the instance of a Court of Justice, as happened in this case, amounts to contempt of Court. No body therefore can bring any proceedings against a receiver, in his capacity as such, including execution proceedings, which includes garnishee proceeding, without the leave of the Court, and if such a proceedings is brought, its further prosecution will be restrained.

[3] Order 46 r. 2(1) RHC does not purport to deal with the many situations in respect of which leave of the Court is necessary before proceedings or some step in the proceedings may be commenced but is restricted to circumstances in respect of only writs of execution where leave is required. Garnishee proceedings which no doubt, in a sense, are a form of execution proceeding however come under O.49 and are initiated by an application made ex-parte by summons and are not by way of a writ. They have no place under O. 46 and accordingly nothing turns on the omission to include garnishee proceedings in the list of cases set out in r. 2(1) thereof.

[4] Each of the garnishee orders herein, having been obtained without leave, were improperly obtained, and in proceedings to obtain them as well as in obtaining them, the garnishors were in contempt of the Court that appointed the receiver. The garnishee orders therefore are of no effect and if there had been any amount paid to the garnishors pursuant to the garnishee orders, such amount should forthwith be repaid to the receiver.

[5] There is no provision in the Partnership Act that specifies any precedence or order of priority in which the debts of the firm and its liabilities are to be paid. This therefore is a clear case for the invocation of the maxim Equality is Equity that distribution of property and losses should be proportionate to the several claims or to the several liabilities of the person concerned. That apart, s. 47 of the Act preserves the application of the rules of equity and common law in respect of matters pertaining to partnerships and accordingly our Courts, being Courts of equity, will frown on iniquitous distribution of the assets. It is improper to

establish a preference among the creditors on the basis of first come first paid. Payment of the debts and liabilities of the firm to persons who are not partners therein, hence, should be effected *pari passu*.

[Appeal Allowed].

[**Bahasa Malaysia** Translation of Headnote]

UNDANG-UNDANG PERKONGSIAN: Pembahagian aset-aset perkongsian oleh penerima - Tanggungan tak bercagar - Keutamaan atas pembayaran keluar - Sama ada atas dasar pari passu - Sama ada atas dasar siapa dahulu dia dapat - Pepatah Persamaratan adalah ekuiti - Sama ada akan dipakai - Akta Perkongsian 1961 seksyen 46 dan 47.

PENERIMA-PENERIMA & PENGURUS-PENGURUS: Prosiding-prosiding terhadap penerima-penerima yang dilantik oleh Mahkamah tanpa kebenaran - Larangan - Prinsip amnya - Sama ada pemakaiannya luas - Sama ada untuk dipakai-hanya kepada kes-kes di mana kelakuan penerima dijadikan isu.

PENERIMA-PENERIMA & PENGURUS-PENGURUS: Prosiding-prosiding terhadap penerima-penerima yang dilantik oleh Mahkamah tanpa kebenaran - Sama ada membawa kepada penghinaan - Sama ada hendak ditegah - Sama ada kebenaran Mahkamah merupakan syarat terdahulu - Pelaksanaan perintah-perintah - Sama ada tidak baik dan tidak mempunyai kesan - Aturan 46 k. (2)(1) Kaedah-Kaedah Mahkamah Tinggi 1980.

Ini merupakan satu rayuan terhadap keputusan Mahkamah Tinggi dalam memutuskan antara lainnya bahawa melainkan di mana salah laku telah dikatakan, kebenaran adalah tidak perlu bagi memulakan pelaksanaan terhadap seorang penerima yang telah dilantik oleh Mahkamah. Fakta-fakta adalah bahawa perayu, sebuah firma perkongsian, telah dibubarkan oleh perintah Mahkamah dan berikutan itu penerima telah dilantik oleh Mahkamah untuk membahagikan aset-aset firma tersebut di bawah s.46 Akta Perkongsian. Akibat daripada itu anggaran 1 (satu) juta ringgit telah jatuh ke tangan penerima.

Beberapa ketika selepas perlantikan, tiga pemiutang tak bercagar yang mempunyai penghakiman terhadap firma tersebut, tanpa kebenaran Mahkamah, telah mengeluarkan prosiding-prosiding yang digarnis terhadap penerima dan selaras dengan itu, telah mendapatkan perintah-perintah yang digarnis ke atas wang tersebut. Dalam saman untuk arahan yang dipohon oleh penerima kemudiannya, berhubung dengan keutamaan yang hendak diberikan berkaitan dengan keluar wang tersebut, ketiga-tiga pemiutang tersebut, sebagai pencelah berhujah bahawa melalui alasan perintah-perintah yang digarnis tersebut di atas, mereka telah memperolehi keutamaan di atas kesemua pemiutang-pemiutang tak bercagar tersebut dan dengan itu berhak untuk dibayar segera.

Tuan Hakim yang bijaksana ketika memutuskan bahawa penggarnis tidak kebenaran untuk meneruskan prosiding-prosiding yang digarnis yang dipersoalkan seterusnya membezakan *Zainal Abidin Putih lwn. Che Wan Development Sdn. Bhd.* [1992] 3 CLJ 1539 / [1992] 2 MLJ 233 dan memutuskan bahawa prinsip yang dibentangkan dalam kes itu bahawa prosiding-prosiding mungkin tidak akan dimulakan terhadap penerima tanpa kebenaran tidak terpakai. Menurut Tuan

Hakim yang bijaksana, pandangan yang beliau terima-pakai telah disokong oleh Aturan 46 k. 2(1) Kaedah-Kaedah Mahkamah Tinggi 1980, kerana perintah itu membentangkan keadaan-keadaan di mana writ pelaksanaan mungkin dikeluarkan tanpa kebenaran telah dengan jelasnya secara khususnya tertinggal untuk memasukkan prosiding-prosiding yang digarnis. Berhubung dengan wang yang berada dalam tangan penerima, ianya telah diputuskan bahawa pembahagian *pari passu* berhubung dengan tanggungan-tanggungan tak bercagar tidak terpakai kepada pembahagian aset-aset perkongsian di bawah s. 46 Akta Perkongsian. Oleh itu penerima menurut Tuan Hakim yang bijaksana adalah tak terikat untuk membayar keluar atas dasar siapa dahulu dia dapat.

Di hadapan Mahkamah Agung, isu utama yang tinbul adalah sama ada kedua-dua keputusan yang telah dibuat oleh Tuan Hakim yang bijaksana sepertimana yang tersebut di atas, adalah wajar dan di dalam apa-apa keadaan sama ada ianya membayangkan kedudukan sebenar undang-undang.

Diputuskan:

[1] Adalah merupakan amalan biasa bahawa penerima yang dilantik oleh Mahkamah adalah merupakan seorang pegawai Mahkamah yang mempunyai kewajipan-kewajipan untuk melaksanakan menurut perintah Mahkamah dan adalah berhak kepada perlindungan oleh Mahkamah terhadap sebarang gangguan dengan kewajipan-kewajipannya. Dalan keadaan yang sedemikian kebenaran Mahkamah sepatutnya perlu diperolehi untuk meneruskan tindakan terhadapannya dan ini adalah tanpa menghiraukan sama ada perlakuannya menjadi isu.

[2] Mahkamah ini tidak bersetuju dengan saranan Tuan Hakim yang bijaksana bahawa *Zainal Abidin Putih lwn. Che Wan Development Sdn. Bhd.* tidak tepakai dan mengulangi bahawa terdapatnya prinsip am pemakaian luas bahawa gangguan terhadap mana-mana orang yang mempunyai kewajipan untuk melaksanakan atau menurut perintah Mahkamah Kehakiman seperti yang berlaku dalam kes ini membawa kepada penghinaan Mahkamah. Dengan itu tidak ada sesiapa yang boleh memulakan apa-apa prosiding terhadap seseorang penerima, dalam kedudukan sedemikian termasuk prosiding-prosiding pelaksanaan, yang mana termasuk prosiding-prosiding yang digarnis tanpa kebenaran Mahkamah, dan jika prosiding sedemikian dimulakan pendakwaannya yang selanjutnya akan ditegah.

[3] Aturan 46 Kaedah 2(1) Kaedah-Kaedah Mahkamah Tinggi tidak bertujuan untuk berurusan dengan situasi-situasi yang banyak berhubung dengan kebenaran Mahkamah adalah perlu sebelum prosiding atau beberapa langkah dalam prosiding-prosiding boleh dimulakan tetapi terhad kepada keadaan-keadaan berhubung dengan hanya writ-writ pelaksanaan di mana kebenaran diperlukan. Prosiding-prosiding yang digarnis yang mana tanpa diragui, pada hakikatnya, adalah satu-satunya bentuk prosiding perlaksanaan yang terlinkung di bawah Aturan 49 dan adalah dimulakan oleh satu permohonan yang dibuat melalui saman-saman *ex-parte* bukamya melalui writ. Mereka tidak mempunyai tempat di bawah Aturan 46 dan berikutan itu tidak terdapat apa-apa yang menyebabkan peninggalan bagi memasukkan prosiding yang digarnis dalam senarai-senarai kes yang terbentang dalam Kaedah 2(1) itu.

[4] Setiap satu perintah yang digarnis, setelah diperolehi tanpa kebenaran, adalah diperolehi dengan cara yang tidak teratur, dan dalam prosiding-prosiding untuk mendapatkannya, penggarnis-penggarnis ini telah melakukan penghinaan

Mahkamah yang telah melantik penerima-penerima tersebut. Perintah-perintah yang digarnis tersebut dengan itu tidak berkesan dan jika telah terdapat apa-apa jumlah yang telah dibayar kepada penggarnis-penggarnis selaras dengan perintah-perintah yang digarnis, jumlah yang sedemikian haruslah dengan itu dibayar balik kepada penerima-penerima.

[5] Tidak terdapat apa-apa peruntukan dalam Akta Perkongsian yang menentukan perintah apa-apa duluan atau keutamaan perintah dalam mana hutang-hutang firma tersebut dan tanggungan-tanggungannya haruslah dibayar. Ini adalah dengan itu keadaan yang jelas bagi permohonan pepatah Kesamarataan adalah ekuiti bahawa pembahagian harta dan kerugian seharusnya berkadar dengan beberapa tuntutan atau kepada beberapa tanggungan orang yang berkenaan. Mengenepikan perkara ini, s. 47 Akta tersebut mengekalkan pemakaian kaedah-kaedah ekuiti dan common law berhubung dengan perkara-perkara yang berkaitan perkongsian dan sehubungan itu, Mahkamah-Mahkamah kami, yang merupakan Mahkamah ekuiti tidak akan menyetujui pembahagian aset-aset yang tidak adil. Adalah tidak wajar untuk menentukan keutamaan antara pemiutang-pemiutang tersebut atas dasar siapa dahulu dia dapat. Pembayaran hutang-hutang dan tanggungan firma kepada orang-orang yang bukan merupakan rakan kongsi, dengan itu, haruslah dikuatkuasakan secara *pari passu*.

[Rayuan dibenarkan].

Cases referred to:
Zainal Abidin Putih & Anor v. Che Wan Development Sdn. Bhd. [1992] 3 CLJ 1539; [1992] 2 MLJ 233 ***(foll)***
Dixon v. Dixon [1903] 1 Ch. pp. 161, 163 ***(foll)***
Ames v. Birkenhead Docks Truestees [1985] 20 Beav. p. 332 ***(foll)***
Searle v. Choat [1884] 25 Ch. D. p. 723. ***(foll)***
De Winton v. The Mayor of Brecon [1860] 28 Beav, 54 ER p. 342 ***(cit)***
Lane v. Sterne [1862] 3 Giff p. 629, 66 ER p. 559 ***(cit)***
J Kahn & Anor v. Ali Mohomed Hali Umer [1892] 16 ILR pp. 579-580 ***(cit)***
Yates v. Terry [1902] 1 KB. p. 527 ***(dist)***
Re Cowan's Estate ***(dist)***
Rapier v. Wright [1880] 42 LRR p. 866 ***(dist)***
Petit v. Smith [1695] 1 P wins pp. 7, 8 ***(foll)***
Rudd & Son Ltd. [1984] 2 WLR p. 831 ***(foll)***
Searle Hoare & Co. [1924] 2 Ch. p.325 ***(foll)***
Re Midland Express Ltd. [1914] 1 Ch. p. 41 ***(foll)***
Re Johnson - [1887] 20 QBD 68 ***(foll)***
Re Maidstone Palace of Varieties Ltd. [1909] 2 Ch. 2 & 3 ***(dist)***
Re Potter ex-parte Day [1883] 48 LT. 912 ***(dist)***

Legislation referred to:
Partnership Act 1961, s. 46(b)(i), 47
Rules of High Court, O.46, O.49 r.12(1), O. 89,

Other sources referred to:
The Law Relating to Receivers, Managers and Administrators, Hubert Picarda, 2nd Ed. p.347
Company Receivers and Managers, James O'Donovan, 2nd Ed.
Law & Practice of Receivers and Administrators, Kerr, 17 Ed. p. 143

For the appellant - Cecil Abraham (S.L. Lim with him); M/s. Riza Leong & Partners
For the respondent - K.L. Wong; M/s. K.L. Wong & Co.

JUDGMENT

V.C. George J:

We had allowed this appeal on the 6 September 1994. We now give our reasons for doing so.

In originating summons D2-31-198-88 the High Court had on 6 March 1990 declared that the partnership firm known as Tai Kwong Goldsmiths & Jewellers "do stand dissolved". The Court went on to order that:

> Dato Rohailan Bin Mohamad be and is hereby appointed the receiver of the said firm to get in and realise the assets, accounts and monies receivable by the firm and determine its liabilities for the purpose of a dissolution of the said business and to do all that is necessary and/or needful to undertake his task under s. 46 of the Partnership Act, and make appropriate settlement and distributions there under.

Section 46(b) of the Partnership Act, 1961 provides that on the dissolution of a partnership its assets should be distributed in the following manner and order:

> (i) in paying the debts and liabilities of the firm to persons who are not partners therein;
>
> (ii) in paying to each partner rateably what is due from the firm to him for advances as distinguished from capital;
>
> (iii) in paying to each partner rateably what is due from the firm to him in respect of capital; and
>
> (iv) the ultimate residue, if any, shall be divided among the partners in the proportion in which profits are divisible.

Section 47 provides that:

> The rules of equity and of common law applicable in partnership shall continue in force, except so far as they are inconsistent with the express provisions of this Act.

The receiver in the instant case, who as has been seen had been appointed by the Court, in discharging his duties as receiver got in a total of just over RM1 million against liabilities owed by the firm of some RM10 million which was the aggregate of amounts owed to various persons who had deposited monies with the firm and amounts owed to other unsecured creditors which included termination benefits payable to the erstwhile employees of the firm pursuant to an order of the Industrial Court.

Now, sometime after the aforesaid appointment of the receiver, three of the depositors who had judgments against the firm had obtained garnishee orders, in effect, against the monies in the hands of the receiver. None of them had obtained the leave of the Court to take out the garnishee proceedings.

By summons in chambers dated 12 September 1992 the receiver had applied to the Court for directions in respect of priority to be given in respect of the payment out of the monies got in. Pending the disposal of the application for directions the receiver had obtained a stay of execution against each of the depositors who had obtained judgments including the three who had obtained the garnishee orders.

The trio had thereafter successfully applied to be heard in the summons for directions as intervenors and had contended that because they had the garnishee orders in hand they were entitled to be paid forthwith on the basis of priority over all the other unsecured creditors.

A preliminary point taken on behalf of the receiver at the summons for directions was that the receiver having been appointed by the Court and as such was in effect an officer of the Court, a condition precedent to taking out any proceedings against him (which includes garnishee proceedings) was the obtaining of the leave of the Court that had appointed the receiver and as such leave had not been obtained by the garnishors or any of them the garnishee orders were bad. It was also contended on behalf of the receiver, that in any event all the unsecured creditors including the three depositors who had obtained the garnishee orders and the said esrtwhile employees entitled to termination benefits were all entitled to a distribution of the monies with the receiver (after deduction of the receiver's fees expenses and the costs) on a *pari passu* basis.

The record shows that the learned Judge's attention was *inter alia* drawn to the judgment of the Supreme Court in *Zainal Abidin Putih & Anor v. Che Wan Development Sdn. Bhd.* [1992] 2 MLJ 233 where certain originating summonses had been without leave taken out against receivers appointed by the Court. Gunn Chit Tuan, SCJ (as he then was) in reading the judgment of the Court said (at page 241 of the report):

> We would start off by pointing out that the appellants were appointed receivers by the Court and are therefore first and foremost officers of the Court, and to use the words of Viscount Haldane LC in *William H Parsons & Ors. v. The Sovereign Bank of Canada* "put in to discharge certain duties prescribed by the order appointing him." But the important point in this case was that as the appellants are officers of the Court, leave of the Court should have been obtained to proceed against them in the second originating summons and the case of *Re Maidstone Palace of Varieties Ltd.* was correctly cited by counsel for the appellants in support of his submission that leave of the Court was necessary.

We pause to note that there had been no allegations of misconduct on the part of the receiver in that case. Tan Sri Gunn Chit Tuan pointed out at page 242 of the judgment:

> But our present case was not one in which the appellants, as receivers, had caused unnecessary proceedings or litigious expenses. In the first originating summons, it was the respondent that had brought the action against the Co-operative Central Bank Bhd. In the second originating summons, it was again the respondent that had taken the action against the appellants. Therefore it was not the appellants, as receivers, who had by their misconduct made any unnecessary application to Court for the Court to exercise its discretion to make an adverse order against them.

However in the judgment the subject of the instant appeal, the learned Judge went on to hold that the leave of the Court was not necessary to take out proceedings against the receiver. His view was that *Zainal Abidin Putih & Anor v. Che wan Development Sdn. Bhd.* (*supra*) was distinguishable and that it is only in respect of proceedings against receivers where misconduct is alleged that leave of the Court had to be obtained before the proceedings were commenced.

The learned Judge also ruled that distribution *pari passu* in respect of unsecured liabilities does not apply in a distribution of partnership assets pursuant to s.46 of the Partnership Act. He appeared to be of the view that the receivers should pay out the monies on a first come paid basis.

The appeal before us was in respect of those two rulings.

It is trite that a Court appointed receiver is an officer of the Court and accordingly any interference with him or with property under his control constitutes a contempt of Court. In *Dixon v. Dixon* [1903] 1 Ch. 161, 163, Swinfen Eady J with reference to a receiver and manager appointed by the Court in respect of a partnership dissolved by the Court, took the view in respect of interference with the receiver and manager as something calling for the invocation of the broad principle of protection of an officer of the Court. He said:

> The object of the Court is to prevent any undue interference with the administration of justice, and when any one whether a partner in business, a party to the litigation or a stranger, interferes with an officer of the Court it is essential for the Court to protect the officer.

Hubert Picarda in his **The Law Relating to Receivers, Managers and Administrators** 2nd Ed. at p. 347 says:

> The relative priorities which obtain between a receiver and a debtor's execution creditors are the same for private and Court receivers. A judgment creditor who has levied, but not completed, execution at the time of the appointment is usually stopped in his tracks: the receiver has the edge in priority.
>
> There is, however, in the case of a Court-appointed receiver this additional restriction: that as the receiver is an officer of the court, steps taken against him have to observe proper formalities.

He goes on to say relying on a number of judgments of the English Courts including *Ames v. Birkenhead Docks Trustees* [1985] 20 Beav. 332:

> Accordingly a judgment creditor ought not, without the leave of the Court, to levy execution on property which is in the hands of the receiver, albeit that his judgment was obtained before the appointment of the receiver.

In *Ames v. Birkenhead Docks Trustees* (*supra*) Lord Romilly said at p. 332:

> There is no question but that this Court will not permit a receiver appointed by its authority, and who is therefore its officer, to be interfered with or dispossessed of the property he is directed to receive, by anyone, although the order appointing him may be perfectly erroneous; this Court requires and insists that application should be made to the Court, for permission to take possession of any property of which the receiver either has taken or is directed to take possession.

The authoritative **Company Receivers and Managers** 2nd Ed. James O'Donovan refers to a whole string of authorities conclude at page 7625:

> The receiver and manager is shielded from interference by any person who does not obtain the leave of the court. Even the debenture holder or another receiver should not disturb the appointee's possession without the authority of the Court. Equally, a person with a paramount title or a person for whose protection the appointment was made may intervene only with leave.

As does the even more authoritative Kerr on the **Law & Practice of Receivers and Administrators**, 17 Ed. where p. 143 is the unqualified statement:

> When the court has appointed a receiver and the receiver is in possession, his possession is the possession of the court, and may not be disturbed without its leave.

If any action is brought against the receiver without leave its further prosecution will be restrained - *Searle v. Choat* [1884] 25 Ch. D. 723.

As has been seen, the learned Judge in the instant case was not prepared to accept as a general principle that proceedings may not be instituted against a receiver without the leave of the Court. He says at page 10 of his judgment:

> It is only where the conduct or misconduct of the receiver is being put into question in any Court of law by a claimant against the receiver personally or in the manner of his conduct in discharging his duties that leave of the Court must be obtained. Leave of the original Court appointing the receiver is required because it is only proper that, as the Court originally appointing the said receiver, it should be the proper forum to give direction supervise or discipline if necessary and decide on any issue pertaining to the conduct of its own officers. (*Re Maidstone Palace of Varieties Ltd.* and *ex parte Dat: Re Potter* applied).

The learned Judge took the view that the Supreme Court in *Zainal Abidin Putih v. Che Wan Development Sdn. Bhd.* (*supra*) was "over-simplifying" the relevant law when it said:

> But the important point in this case was that as the appellants are officers of the Court, leave of the Court should have been obtained to proceed against them ... and the case of *Re Maidstone Place of Varieties Ltd.* was correctly cited by Counsel for the appellants in support of his submission that leave of the Court was necessary.

The leading text book writers on the subject do not see the principle being applied in the restrictive manner in which the learned Judge says it should be applied. Further, our attention was drawn to a number of judgments of Superior Courts where the principle was allied to situations where the conduct of the receiver was not in issue:

1. *Ames v. The Trustees of the Birkenhead Docks* (*supra*):
2. *De Winton v. The Mayor of Brecon* [1860] 28 Beav, 54 ER 342 at 343;
3. *Lane v. Sterne* [1862] 3 Giff 629, 66 ER 559 at 560
4. *J Kahn & Anor v. Ali Mohomed Hali Umer* [1892] 16 ILR at 579-580;
5. *Zainal Abidin Putih & Anor v. Che Wan Development Sdn. Bhd.* (*supra*).

It is appropriate that we point out that the principle stems from a general principle of wide application, that interference with persons having duties to perform in a Court of Justice amounts to contempt of Court. Bowen L.J. in *Re Johnson* [1887] 20 QBD 68 at 74 said:

> The law has armed the High Court of Justice with the power and imposed on it the duty of preventing *brevi manu* and by summary proceedings any attempt to interfere with the administration of justice. It is on that ground, and not on any

a exaggerated notions of the dignity of individuals that insults to judges are not allowed. The principle is that those who have duties to discharge in a Court of justice are protected by the law, and shielded on their way to the discharge of such duties, while discharging them, and on their return therefrom, in order that such persons may safely have resort to Courts of justice.

And as has been seen it is trite that receivers appointed by the Court come within b the category of persons having duties to discharge in a Court of Justice.

Re Maidstone Palace Varieties Ltd [1909] 2 Ch. 283 and *Re Potter* [1883] 48 LT 912, relied on by the learned Judge are nothing more than examples of the application of the general principle and do not in themselves constitute or give rise to a general principle. Neither of those cases even suggest, not to speak of or lay down, any rule to the effect that leave of the Court to proceed against a c receiver need only be obtained where misconduct is alleged.

The other two cases cited by the learned Judge, *Yates v. Terry* [1902] 1 KB. 527 and *Re Cowan's Estate, Rapier v. Wright* [1880] 42 LRR 866 also do not help in that in neither case was the issue of leave raised. In the former case there is nothing to suggest that the receiver was Court appointed.

d The learned Judge sought to find support for the view he had taken from the fact that O. 46 r. 2(1) of the Rules of High Court (RHC) sets out the instances in which a writ of execution may not issue without leave and by seeing some significance in that the rule "conspicuously and specifically omitted to include garnishee proceedings".

e Order 46 deals with writs of execution which are forms of written command in the name of the Chief Justice of the Court concerned, to the sheriff of the Court. Order 46 r. 1 and the forms prescribed in respect thereof in the RHC show that in fact there are only 4 kinds of writs of execution provided for by the RHC, namely writs of seizure and sale, of delivery, of possession and of possession under O. 89. In certain circumstances, in respect of those writs of execution, O. f 46 r. 2(1) provides for leave to be obtained before the writ may issue. Order 46 r. 2(1) does not purport to deal with the many situations in respect of which leave of the Court is necessary before proceedings or some step in the proceedings may be commenced but is restricted to circumstances in respect of only writs of execution there leave is required.

g Garnishee proceedings which no doubt in a sense are a form of execution proceeding however come under O. 49 RHC and are initiated by an application made *ex parte* by summons and are not by way of a writ. They have no place in O.46. Accordingly nothing turns on the omission to include garnishee proceedings in the list of cases set out in O.46 r.2(1).

We would accordingly and with respect disagree with the learned Judge's h suggestion that *Zainal Abidin Putih v. Che Wan Development Sdn. Bhd.* (*supra*) does not apply and would reiterate that there is a general principle of wide application that interference with persons having duties to perform in or at the instance of a Court of Justice amounts to contempt of Court. And stemming from i that principle, we lay down, in the context of the issues raised in this appeal, that the Court will not permit a receiver appointed by its authority and who is there for its officer, to be interfered with without leave. In elaboration (but without retrogating the effect of the rule) we further lay down that nobody can

bring any action or proceedings against a receiver, in his capacity as such, including execution proceedings which includes garnishee proceedings, whether misconduct of the receiver is in issue or not, without the leave of the Court and if such an action or proceeding is brought without leave, its further prosecution will be restrained.

In our judgment each of those three garnishee orders having been obtained without leave were improperly obtained and in proceeding to obtain them and in obtaining them the appellants were in effect in contempt of the Court that appointed the receiver. The garnishee orders and each of them are of no effect. If there had been any amounts paid to the garnishors pursuant to the garnishee order such amounts should be forthwith repaid to the receiver.

We now deal with the learned Judge's ruling in respect of the application of the monies in the hands of the receiver. As has been seen, s. 46(b)(i) provides that in a dissolution of a partnership its assets should be applied firstly in paying the debts and liabilities of the firm to persons who are not partners. It is to be noted that there is no provision in the Act that specifies any precedence or order of priority in which such debts and liabilities are to be paid.

In our judgment this is a clear case for invocation of the maxim *equality is equity* or as Lord Somers LC stated it in *Petit v. Smith* [1695] 1 P Wins 7 & 8, "equity delights in equality." The maxim succinctly expresses the object of both law and equity, that distribution of property and losses should be proportionate to the several claims or to the several liabilities of the person concerned.

The maxim was applied by Nourse J in In *Re Rudd & Son Ltd. [1984] 2* WLR 831 at 835 where having pointed out that the creditors of the partnership have priority over the creditors of the companies who were the partners, went on to apply *vis a vis* the creditors of the partnership the maxim:

> The result, so far as material, is that, the creditors of the partnership are, in regard to the partnership assets, to take priority over the creditors of each of the companies. But that is as far as it goes. There is nothing to say that the partnership creditors shall not rank pari passu as between themselves. In other words, if Mr. Mummery is to establish a preference for one or more classes of the partnership debts over others he must look elsewhere.

In re *Searle Hoare & Co.* [1924]2 Ch. 325 at 328 is another illustration of the application of the maxim:

> In my judgment, there is nothing in the statement of Jessel M.R. which warrants the proposition that, where there is a common fund which is being administered for the equal benefit of all the creditors, a creditor who has been paid, out of that fund more than was due to him is entitled to receive further moneys out of the fund without first giving credit for the over-payment.

In *Re Midland Express Ltd.* [1914]1 Ch. 41 provides at page 48 yet another illustration of the application by the English Courts of the maxim:

> Some debenture-holders have received interest and others not, and there has been inequality in the payment of interest. That happened before the floating security cease to float or, as the term is, "crystallized." Since the crystallization the assets have been or are being realized, and the contention of the appellants

is that those debenture-holders who have not received interest on a par with the others must first receive a payment to level them up to what the others have received before there can be any other distribution. that contention is based on the maxim of equity that "equality is equity," and the appellants have relied upon various cases as illustrations of the way in which that maxim is applied in the administration of equity.

In our judgment, to establish a preference among the creditors on the basis of first come first paid is to run foul of the maxim. Section 47 of the Act preserves the application of the rules of equity and common law in respect of matters pertaining to partnerships and accordingly and in any event our Courts being Courts of equity will frown on any such iniquitous distribution of the assets.

In the instant case there not being any specific provision to the contrary, the maxim has to be applied. Payment, (pursuant to s. 46(b)(i) of the Partnership Act 1961), of the debts and liabilities of the firm to persons who are not partners therein should be effected *pari passu*.

The appeal had to be and was allowed with costs.